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Dale M. Iwataki
Indiana University School of Law

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A Prisoner's Right to a Protective Transfer from State to Federal Prison

The considerable interest shown for prisoners' rights in recent years signifies a growing perception that one way to test the bounds of the rights and privileges ostensibly accorded all individuals under the Constitution is to gauge their application to those who have forfeited many rights and privileges by committing crimes meriting incarceration. The law's respect for the rights of prisoners ultimately attests to the law's respect for the rights of free citizens. One area which has not been commented on involves state prisoners who must be placed in solitary confinement because of danger to their lives and not because of disciplinary reasons. These are the inmates who will surely encounter physical attack if they are allowed to mingle with the general prison populace either because they are particularly susceptible to homosexual assault or because they have committed some act that outrages a sizable group of prisoners, such as informing the police or stirring racial hatred or harming a popular political figure. These prisoners may, at the discretion of the prison officials, be transferred to a federal prison; but often such transfers are approved only if the families of these prisoners will pay the cost of maintaining them. This practice of conditioning transfers on financial ability warrants attention because it poses serious constitutional problems.

This practice has not been sanctioned by any court, nor has it been specifically authorized by any legislative authority.[1] The only statute which arguably provides such authority is a federal statute which authorizes the Attorney General, after the Director of the Bureau of Prisons has certified that proper and adequate treatment facilities and personnel are available, to

> contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided, That any such contract shall provide for*

[1] In those few states, notably Alaska and Maine, where the legislature has enacted statutes regarding the transfer of state prisoners to federal institutions, the burden of defraying the cost of maintenance is not placed on the families of the prisoners, but on the state. *See* ALASKA STAT. § 33.30.060(a) (1962), ME. REV. STAT. ANN. tit. 34, § 707 (1964).

reimbursing the United States in full for all costs or other expenses involved.[2]

The statute can be read as sanctioning private financing if only because it does not prohibit such an arrangement. However, the legislative history indicates this was not the intent. The statute, enacted in 1952, grew out of frequent requests by state officials that the Bureau of Prisons undertake the custody of those who needed specialized treatment, such as drug addicts, or who needed corrective guidance and training, such as juvenile offenders, but were unable to receive such treatment and training in state facilities. At the time of passage no one envisaged placing on the families of prisoners the burden of reimbursing the federal government for maintaining those prisoners.[3] The cost burden was clearly allocated to the state.

However, in practice the burden has been allocated to prisoners or their families, regardless of the scheme envisioned by the act. Given the fact that the federal statute demands reimbursing the federal government for the care and custody of transferred state prisoners, it is easy to speculate why the burden would be shifted from the state to the families of the prisoners.[4] This practice is but one method of relieving an inadequately financed corrections department.[5] Whatever the explanation, the practice of removing state prisoners to federal institutions at personal rather than public expense somehow started and now exists. Such a practice is troubling, for it clearly discriminates against those prisoners whose families cannot afford the cost of maintaining them at a federal prison. Prisoners lacking such financial support must endure the rigors of solitary confinement for purely protective, nondisciplinary reasons while those with financial resources can seek transfer to a federal prison and, if allowed to do so, escape restrictive isolation in state prisons. The issue is whether this discrimination against the financially unresourceful prisoner rises to the level of a constitutional violation. However, before reaching the constitutional implications of this question, a preliminary question must be explored. It is whether a state prisoner, given a bona fide reason, such as having

[2] 18 U.S.C. § 5003(a) (1970) (emphasis added).

[3] *See* 1952 U.S. CODE CONG. & AD. NEWS 1420. Nor did that issue arise in the two court decisions based on this statute. Duncan v. Madigan, 278 F.2d 695 (9th Cir. 1960), *cert. denied,* 366 U.S. 919, *rehearing denied,* 366 U.S. 947, *cert. denied,* 368 U.S. 905 (1961); Dwyer v. State, 449 P.2d 282 (Alas. 1969).

[4] Perhaps state prison officials could not afford transferring those who faced protracted solitary confinement for merely protective reasons; or perhaps they were simply not authorized by their legislatures to use state funds for such a purpose—drug addicts and juvenile offenders having higher claims to consideration.

[5] American Friends Service Comm., Struggle for Justice 11 (1971).

to remain in solitary confinement for fear of his life and thus having to forego the opportunity for training, education, work, recreation, social contact, and other activities, can compel his transfer to a federal prison.

There is no state or federal statute that confers the right to be transferred, nor is there any judicial decision that recognizes such a right. In those states where there is statutory authority to transfer prisoners, the initiative and the decision are entirely within the discretion of the state officials. Courts have consistently rejected any claim that the opportunity to transfer is a basic right.[6] A prisoner has neither the constitutional right to remain in a particular prison,[7] nor the right to be sent to a particular prison.[8]

The difficulty of demanding transfer is further enhanced because some courts deny their own authority or power to designate the place of imprisonment.[9] Some courts may hesitate to direct the state Attorney General to commit a state prisoner to a federal institution because of the federal statute which confers such power on the U.S. Attorney General.[10] One federal court, however, did order the director of a medical center for federal prisoners to transfer a prisoner to a certain type of federal prison. In *Ricketts v. Ciccone* a federal prisoner sought transfer on a writ of habeas corpus to a prison in a climate of low humidity because of chronic rhinitis caused by an allergy to a certain mold. By previous order he was to be transferred to a prison in a climate of high humidity where the mold could flourish.[11] The court held that the transfer initially ordered was unreasonable given the circumstances and directed that the prisoner be given the most suitable medical treatment reasonably available, which was "allergic desensitization in a climate of low humidity."[12] Here, the court ordered the director of the medical center to transfer the prisoner to an institution in a climate of low humidity. The court reached this decision because the requested treatment was a *needed* one, not because it was desirable. To invoke this case in support of an argument for transfer, it would be necessary

[6] *See* Peiffer Petition, 193 Pa. Super. 476, 166 A.2d 325 (1960) (transfer from a state prison to a county jail); Kohler v. Nicholson, 117 F.2d 344 (4th Cir. 1941) (dictum) (release from federal prison).

[7] Gray v. Creamer, 465 F.2d 179, 187 (3d Cir. 1972).

[8] Peiffer Petition, 193 Pa. Super. 476, 166 A.2d 325 (1960). *Accord,* Stokes v. Institutional Bd., 357 F. Supp. 701 (D. Md. 1973). "[T]he inmate has no right to confinement in one institution as opposed to another." *Id.* at 705 (dictum).

[9] Thogmartin v. Moseley, 313 F. Supp. 158, 160 (D. Kan. 1969), *aff'd,* 430 F.2d 1178 (10th Cir.), *cert. denied,* 400 U.S. 910 (1970).

[10] 18 U.S.C. § 4082(a) (1970) provides that the court commit a person who has been duly convicted to the Attorney General, who shall designate the place of confinement.

[11] 371 F. Supp. 1249 (W.D. Mo. 1974).

[12] *Id.* at 1256.

to show that the rationale for the transfer is founded on a need for essential treatment, not merely on a desire for better treatment. It should be noted that no question of jurisdiction arose in this case because the transfer was from one federal prison to another. As such, the problem noted above, respecting a state court's authority over the administration of federal prisons, did not exist.

To overcome the judicial barrier against granting a transfer, it must appear that transfer is the only reasonable relief in a given situation. However, the encrusted reluctance of courts to interfere with the administration of prison systems must be overcome even to launch this argument since many courts tend to view the problems of confinement as problems that must be left to the discretion of prison officials.[13] In recent years, though, some courts have shown a willingness to repudiate the "hands-off" policy toward prisons and to supervise important penal reforms.

This shift in attitude has sprung from a reaffirmation of the idea that prisoners do not lose all their constitutional rights when incarcerated.[14] While prisoners may be divested of their rights to vote, to travel, to associate freely among others, they may not, without the showing of a compelling state interest, be divested of their right to worship and other first amendment freedoms.[15] Moreover, the due process and equal protection clauses of the fourteenth amendment shield them "from unconstitutional action on the part of prison authorities carried out under color of State law."[16] Therefore, the first area of constitutional inquiry is whether protective solitary confinement itself violates a constitutional right of a prisoner.

Solitary confinement may trigger judicial intervention in prison

[13] *See* Sawyer v. Sigler, 445 F.2d 818 (8th Cir. 1971). In Newkirk v. Butler, 364 F. Supp. 497, 501 (S.D.N.Y. 1973), the court said: "Outside [the] area of constitutionally protected rights lies the realm of day-to-day prison discipline or administration in which courts and particularly federal courts are traditionally reluctant to interfere." *See also* Parker v. McKeithen, 330 F. Supp. 435 (E.D. La. 1971). *But see* Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1974), *vacating* 330 F. Supp. 435, *supra.* In this case the court said:

> While it is true that federal courts are usually reluctant to interfere in matters of prison administration . . . it can no longer be correctly asserted that the federal courts are unwilling in *all* situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights.

488 F.2d at 556 (emphasis added) (citations omitted).

[14] Diamond v. Thompson, 364 F. Supp. 659 (M.D. Ala. 1973); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

[15] Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969).

[16] Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968). *Accord,* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

affairs if there is a showing that an administrator's action seriously impinges on the prisoner's statutory or constitutional rights.[17] When courts find such abuse of discretion, they usually speak in terms of extraordinary situations which reflect "subhuman conditions,"[18] or "shocking deprivation of fundamental rights,"[19] or conditions "so foul, so inhuman, and so violative of basic concepts of decency."[20] In the absence of such exceptional circumstances the case may not be heard with sympathy. According to one federal court, only "with respect to persons confined under the criminal law . . . . [a] tolerable living environment is now guaranteed by law."[21]

In keeping with the judicial philosophy that only the foulest conditions of solitary confinement require judicial intervention is the position that denying an inmate the usual amenities of prison does not warrant constitutional scrutiny. In *Breece v. Svvenson*, a maximum security prisoner confined in solitary could find no redress for the deprivation of his alleged right to participate in recreational activities, sports, movies, and television, to pursue academic and avocational interests, to order books, to work at his job assignment and earn monthly wages, or to possess or use his own personal property.[22]

A prisoner who is in solitary confinement for protective reasons may present a more sympathetic cause than did the inmate in *Breece*, who was confined for punitive reasons. Nevertheless, it is unlikely that a court would compel his transfer, because in both cases prison officials can point to legitimate penal needs that justify the discriminatory treatment. Thus, the authorities would be able to meet the due process requirement that there must be proof that the isolation serves legitimate penal concerns.[23] One court has said that whenever "security or some other legitimate interest of the state so requires," there is nothing to prevent the solitary confinement of a prisoner.[24]

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[17] *Cf.* Clements v. Turner, 364 F. Supp. 270, 278 (D. Utah 1973); Jones v. Wittenberg, 323 F. Supp. 93, 98 (N.D. Ohio 1971), *modified*, 330 F. Supp. 707, *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[18] Brenneman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972).

[19] Rodriguez v. McGinnis, 451 F.2d 730, 732 (2d Cir. 1971).

[20] Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), *quoted in* Sostre v. McGinnis, 442 F.2d 178, 192 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

[21] New York St. Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 764 (E.D.N.Y. 1973).

[22] 332 F. Supp. 837, 843 (W.D. Mo. 1971).

[23] *See* Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970). In this case prison officials were unable to offer proof that the isolation of a prisoner served legitimate penal concerns.

[24] Johnson v. Anderson, 370 F. Supp. 1373, 1380 (D. Del. 1974). *See also* Rivera v. Fogg, 371 F. Supp. 938, 939 (W.D.N.Y. 1974): "[S]pecial confinement was not punishment but separation from the rest of the population because of a belief that such segrega-

The courts have also been unresponsive to the argument that solitary confinement denies a prisoner access to the rehabilitative programs of the prison. This has been true even in states where rehabilitation has been explicitly recognized by the legislature as a purpose of imprisonment.[25] In *Wilson v. Kelley*, despite the existence of such a statute, a federal court held that, excepting the constitutional rights which follow a man into confinement, no duty is absolutely owed a prisoner other than to exercise ordinary care for his protection and to keep him safe and free from harm.[26] In *McLamore v. State* a state supreme court said, "Certain constitutional rights follow a person into confinement, but there is no constitutional duty imposed on any government entity to educate or rehabilitate him."[27] In *Powell v. Texas*, the Supreme Court by way of dictum said, "This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects."[28] No case, in fact, has ever held that a prisoner has a constitutional right to rehabilitation.

In *Holt v. Sarver*, a federal court held that the failure of the Arkansas prison system to provide any meaningful rehabilitative program was one significant factor leading to the finding that the system was unconstitutional.[29] Nevertheless, the fact that the imprisonment of offenders serves purposes other than rehabilitation, such as the deterrence of crime and the protection of society, is not conducive to the recognition of a constitutional right to be offered a rehabilitation program.

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tion was essential to the security of the entire institution, as well as petitioner's own protection."

[25] *See, e.g.*, IND. CONST. art. 1, § 18: "The penal code shall be founded on the principles of reformation, and not of vindictive justice." In Indiana, furthermore, the director of the division of classification and treatment within the department of correction is empowered to supervise a "program of human relations and of prison education designed in the broadest sense to bring about the rehabilitation of the inmates." The statute goes on to say:

> The objective of these programs shall be the return of [the] inmates to society with a more wholesome attitude toward living and with a desire to support themselves and their dependents through honest labor. To this end, each inmate shall be given a program of education which is deemed most likely to further the process of rehabilitation . . . .

IND. ANN. STAT. § 11-1-1.1-26 (Code ed. 1973) (bracketed word not in [1971] Ind. Acts 638).

[26] 294 F. Supp. 1005, 1012 (N.D. Ga.), *aff'd mem.*, 393 U.S. 266 (1968). *See also* Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969), in which the court rejected the claim that the failure to provide rehabilitative vocational training constituted cruel and unusual punishment.

[27] 257 S.C. 413, 423, 186 S.E.2d 250, 255 (1972).

[28] 392 U.S. 514, 530 (1968).

[29] 309 F. Supp. 362 (E.D. Ark. 1970). *Accord,* Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

A prisoner, however, does have the right to personal security. While the law may take away a prisoner's liberty and impose "a duty of servitude and observance of discipline for his regulation and that of other prisoners," the law "does not deny his right to personal security against unlawful invasion."[30] Courts recognize this right to some degree of protection from attacks by fellow inmates as a constitutional right, based on the eighth amendment's prohibition against cruel and unusual punishment.[31] A prisoner may allege that the duty that is owed him of providing security from physical violence is best fulfilled by transferring him to another prison. But, where prison officials can protect the prisoner by placing him in solitary confinement, it is questionable whether the more troublesome recourse of carrying out a transfer would be compelled.

A more effective argument that can be made for transfer under the circumstances described is that solitary confinement for protective reasons constitutes cruel and unusual punishment in violation of the eighth amendment. Such confinement is not the punishment for the offense committed, for the prisoner was not sentenced to maximum isolation. Nor is the confinement a disciplinary measure for offenses committed while in prison. It is a protective measure that amounts to excessive punishment because the prisoner is thereby prevented from engaging in the normal activities of other prisoners. The keeping of a prisoner in solitary for protective reasons may constitute what in the words of the Supreme Court is "a punishment out of all proportion to the offense [which] may bring it within the ban against 'cruel and unusual punishments.' "[32] In *Jordan v. Fitzharris*, a federal court declared that a punishment may be cruel and unusual when it goes beyond what is necessary to achieve a legitimate penal aim.[33]

To be sure, protection of a prisoner is a legitimate end. However, solitary confinement may nevertheless run afoul of the eighth amendment if the aim of protecting a prisoner from physical violence can be met by means other than solitary confinement. Restriction to quarters or segregation in a special area, for example, offers similar protection. But if these other means are unavailable in a state prison, the prisoner should be transferred to an institution where they are available. More-

[30] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

[31] Walker v. McCune, 363 F. Supp. 254, 256 (E.D. Va. 1973); Penn v. Oliver, 351 F. Supp. 1292, 1294 (E.D. Va. 1972); Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971).

[32] Robinson v. California, 370 U.S. 660, 668, 676 (1962) (Douglas, J., concurring).

[33] 257 F. Supp. 674, 679 (N.D. Cal. 1966).

over, even if they are available, the prisoner should still be transferred because he would otherwise be denied, as he would in solitary confinement, the opportunity to participate in the usual activities of his fellow prisoners.

Whether this method of argument will be successful is not known. The courts have said that excessive punishment is unconstitutional.[34] But the courts have not said that the protective isolation of a prisoner constitutes excessive punishment, even if isolation entails the deprivation of certain privileges that are uniquely his as a prisoner. It is not likely that a court will so hold, for the courts have consistently upheld the validity of solitary confinement per se when it has been shown to be necessary for proper prison administration.[35] In *O'Brien v. Moriarty*, a federal appeals court regarded segregated confinement which did not involve intolerable conditions as "a necessary tool of prison discipline, both to punish infractions and to control *and perhaps protect inmates* whose presence within the general population would create unmanageable risks."[36] What hope the prisoner has in this situation must be extracted from that pregnant "perhaps."

Having reviewed the arguments that a prisoner seeking transfer could make, it is necessary to return to the question with which this note began: whether there is unlawful discrimination against those state prisoners whose families cannot afford to have them transferred to and maintained at a federal institution. The argument on behalf of these prisoners is that they are denied equal protection by an invidious practice of state prison authorities. This claim requires an initial determination of whether the challenged classification is inherently "suspect." If it is not, the court must determine whether the individual interest affected by the difference in treatment is "fundamental."[37] If the class is suspect or if the interest is fundamental, then a compelling governmental interest in the challenged activity must be shown. If it is not fundamental, then only a rational relationship must be shown between that activity and a justifiable state purpose.[38]

In this case, the classification is apparently based on wealth; for only those whose families can afford the cost of transfer and main-

[34] Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

[35] *See* Adams v. Pate, 445 F.2d 105, 107–08 (7th Cir. 1971); Sostre v. McGinnis, 442 F.2d 178, 192 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

[36] 489 F.2d 941, 944 (1st Cir. 1974) (emphasis added).

[37] Mabra v. Schmidt, 356 F. Supp. 620, 625–26 (W.D. Wis. 1973). *Cf.* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973).

[38] *See* Mabra v. Schmidt, 356 F. Supp. 620, 625 (W.D. Wis. 1973).

tenance have the opportunity to take advantage of the prison officials' discretion. But the Supreme Court has never declared that wealth is a suspect classification like race, creed, or color. Nor has the Court ever demanded absolute equality between rich and poor. As the Court has recently said: "[W]here wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[39]

Although the Supreme Court has found nothing suspect in a classification which differentiates between districts according to wealth for purposes of school financing,[40] the Court has traditionally been more stringent with wealth classifications involving the judicial system[41] or the criminal justice system.[42] *Williams v. Illinois* declared unconstitutional the practice of incarcerating people for periods longer than the maximum sentence permissible under the statute creating the offense because of an inability to pay fines which were imposed as part of the punishment.[43] The Court declared such a practice to be "an impermissible discrimination that rests on ability to pay."[44]

The situation presented by prison officials allowing an inmate to transfer only if he is financially able to bear the costs involved is similar to that presented by *Williams*. Solitary confinement was not deemed a necessary result of conviction by the terms of the judgment and sentence or by the statute creating the offense.[45] Moreover, by offering to transfer a prisoner if he will pay the costs, the corrections officials have implicitly admitted that such confinement is not a necessary consequence of his conviction. The situation runs contrary to the *Williams* prohibition against exacting a more severe punishment just because of indigency.

Therefore, while it can be said, as a general proposition, that wealth is not a suspect classification, it should be remembered that distinctions based upon wealth have been disallowed in areas which either directly or

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[39] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

[40] *Id.* at 28. *But cf. id.* at 25 n.60.

[41] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971), which held it was violative of due process to deny persons, because of inability to pay court fees, access to the courts for purpose of obtaining a divorce. Part of the rationale in *Boddie* was that the state had monopoly control over both marriage and legal dissolution of marriage. Such monopoly control is equally true of the criminal laws and prisons. If monopoly control is the reason for not allowing discriminations based on wealth, *Boddie* is also precedent for not allowing the state to condition transfers on ability to pay. *But cf.* United States v. Kras, 409 U.S. 434 (1973).

[42] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[43] 399 U.S. 235 (1970).

[44] *Id.* at 241.

[45] *See* notes 31–32 *supra* & text accompanying.

indirectly concern the judicial system or the criminal justice system. Since the incarceration of a convicted person is the ultimate consequence of the criminal justice system, the courts may be less tolerant of distinctions related to wealth in that area than they are in the area of school financing.

Assuming, however, that no suspect classification can be found, it is necessary to see if the right claimed by the prisoner is fundamental. In this case, no such right is involved under the Supreme Court's latest test characterizing "fundamental interests" as limited to those "explicitly or implicitly guaranteed by the Constitution."[46] Nothing in the Constitution either explicitly or implicitly bestows on a prisoner the right to be imprisoned where he wishes, the right to be rehabilitated, the right not to be placed in solitary confinement for a legitimate purpose, or the right to be transferred from state prison to a federal prison.[47]

If it is determined that the class is not suspect and that the right involved is not fundamental, the treatment accorded the prisoner must be sustained if "the classification itself is rationally related to a legitimate government interest."[48]

Initially the question is whether there is a relationship between the classification of prisoners whom the corrections officials will not voluntarily transfer and a legitimate government interest. To meet this argument the state need show only that the practice of allowing transfer to some prisoners who are endangered is reasonably related to the legitimate goal of providing physical safety for them. There is, as the state would argue, no absolute deprivation of security for any prisoner. All prisoners are protected from physical attacks; only the means differ, and those means are unobjectionable in themselves. There is no constitutional duty to administer absolutely equal treatment to prisoners. Besides, since it is always within the discretion of state prison officials to sanction a transfer, no state prisoner in protective isolation, however financially resourceful, has a guarantee that he will be transferred. It is not the prerogative of the prisoner to determine what is in his own best interests.

However, the question of classifications must be further refined. In the situation where a prisoner has been told he will be transferred if he or his family will bear the costs, the prison officials have forfeited all

[46] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

[47] *See* notes 27-28 *supra* & text accompanying. The only possible fundamental right which such a situation violates may be the prohibition against cruel and unusual punishment.

[48] United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

penological reasons for their refusal to transfer. The sole rationale for the refusal is the cost involved. In essence, the question becomes not one of a rational relationship of classification to the governmental interest; rather the question becomes one of the legitimacy of the governmental interest.

In recent years cost has not fared well as a justification for unequal treatment. In *Reed v. Reed* the Supreme Court refused to allow the cost of holding hearings on the merits of applications to administer an estate to justify the preferential treatment accorded male applicants.[49] Moreover, cost has often been urged and rejected as a justification for not requiring changes in prison conditions.[50] Given the fact that the number of prisoners who must be confined in solitary for long periods for protective reasons is small, the courts may be willing to require equal treatment for both rich and poor prisoners alike since the aggregate expense involved is relatively small. Allowing a classification based on wealth to stand in such a context would be unreasonable.

It must be noted, however, that there is no direct authority which challenges this practice of prison officials. Since many courts are still reluctant to interfere with the discretion of prison officials, it is perhaps the most informed practical judgment to conclude that a prisoner seeking transfer is left with little effective recourse absent reprehensible conduct on the part of prison officials. Such a prisoner must abide by the discretion of those officials. If he has any hope it is that the legislature will some day take some action for his benefit.

DALE M. IWATAKI

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[49] 404 U.S. 71 (1971). *Cf.* Vlandis v. Kline, 412 U.S. 441 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973).

[50] *See, e.g.*, Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971); Holt v. Sarver, 309 F. Supp. 362, 383 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).